

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No. 6223/2017

In the matter between:

Mukendi Mpoyi

Applicant

and

The Refugee Appeal Board

First Respondent

Francisca Dube N.O.

Second Respondent

Minister of Home Affairs

Third respondent

The Director General: Home Affairs

Fourth Respondent

Judgment

Lopes J:

[1] The applicant in this matter, Mukendi Mpoyi delivered an application on the 1st June 2017 seeking the following relief:

- (a) That the late delivery of his application is condoned in terms of s 9 (1)(b) of the Promotion of Administrative Justice Act, 2000 ('the Act').
- (b) Reviewing and setting the aside the decision of the Refugee Appeal Board of the 22nd April 2015, together with the earlier decision of the second respondent, Francisca Dube, acting in her capacity as a Refugee Status Determination Officer ('RSDO').

- (c) In terms of s 8(1)(c)(ii)(aa) of the Act, substituting the decision of the Refugee Appeal Board and the RSDO with an order declaring that Mr Mpoyi is recognised as a refugee entitled to asylum in terms of s 3 of the Refugees Act, 1998 ('the Refugees Act').
- (d) That the Minister of Home Affairs and the Director General: Home Affairs are directed to issue Mr Mpoyi with written recognition of his refugee status in terms of s 27(a) of the Refugees Act.
- (e) In the alternative directing that the Refugee Appeal Board's decision be reconsidered by the Refugee Appeal Board in terms of s 8(1)(c)(i) of the Act, and further directing the Minister of Home Affairs and the Director General: Home Affairs to reissue Mr Mpoyi with a Temporary Asylum Seekers Permit in accordance with the provisions of s 22 of the Refugee Act, pending the final determination of the hearing of his application before this court.
- (f) Any respondents opposing the application be directed to pay Mr Mpoyi's costs.

[2] The background to Mr Mpoyi's arrival in the Republic of South Africa and his subsequent dealings with the various government officials in pursuit of refugee status, have been set out in his founding affidavit in this application:

- (a) He arrived in South Africa from the Democratic Republic of Congo ('the DRC'), on the 20th June 2005.
- (b) On that day he submitted an application for asylum at the refugee centre in Durban. He could only speak French and was not provided with an interpreter.
- (c) At this first interview, the application process was not explained to him, and he did not fully understand what he was signing.
- (d) Two further interviews were conducted before Ms Dube, a RSDO: on the 30th November 2009, and on the 10th December 2009 (collectively,

‘the second interview’). Although an interpreter was not present, Mr Mpoyi could speak a bit of English by this time. The RSDO was only interested in considering the statement he had made at his first interview, and not in any of his submissions or the documents he had brought to the second interview.

- (e) The RSDO read his statement from the first interview, and requested him to sign documents which she placed before him. He did so. He was not allowed to make any submissions or show her any other documents.
- (f) The RSDO indicated that she did not believe Mr Mpoyi and his application was rejected. She further told him that he could seek legal assistance if he wanted to pursue the matter.
- (g) Annexed to Mr Mpoyi’s founding affidavit is a three page decision of the RSDO dated the 10th December 2009. That decision records that Mr Mpoyi has been refused refugee status on the basis that his application was rejected as ‘unfounded’.
- (h) After his interview Mr Mpoyi complained to the manager of the refugee centre about the treatment he had received at the hands of the RSDO. He claimed he did not have a proper interview as it only lasted for about five minutes, and the RSDO would not listen to anything he said. He was then insulted and treated in a derogatory manner by the manager of the refugee centre.
- (i) On the 12th August 2014 Mr Mpoyi sought assistance from his attorneys of record with regard to the renewal of his permit to reside in South Africa. They obtained a date for an appeal hearing and Mr Mpoyi was given what I presume is a temporary permit until the date of the appeal hearing.
- (j) On the 8th October 2014 Mr Mpoyi appeared before the Refugee Appeal Board. The hearing lasted approximately 30 minutes and the Refugee Appeal Board focused their attention on the documents recording the second interview. The Refugee Appeal Board had a

predetermined conclusion to his case and inherently distrusted him because he was a foreigner.

- (k) During the conduct of the appeal, the Refugee Appeal Board requested to look at Mr Mpoyi's UDPS membership card. That acronym refers to the Union of Democracy and Social Progress, a political party in the DRC. Mr Mpoyi had maintained at all stages that he was a member of that party, which was in opposition to the ruling party of Joseph Kabila.
- (l) A copy was made of Mr Mpoyi's UDPS card. Members of the Refugee Appeal Board also asked to look at his marriage certificate and his children's birth certificates, but they did not make copies of these documents.
- (m) On the 6th July 2015 Mr Mpoyi was told by the Refugee Appeal Board that his appeal had been dismissed, and the decision rejecting his application for refugee status had been upheld. The decision of the Refugee Appeal Board made on the 22nd April 2015, was handed to him. That document formed part of the application papers.
- (n) As Mr Mpoyi had received his refusal letter on the 6th July 2015, he was obliged to leave the Republic of South Africa by the 6th August 2015.
- (o) During November 2016, and concerned that he was residing in South Africa illegally, Mr Mpoyi travelled to the embassy of the DRC in Pretoria to obtain a passport. He was given a passport and he travelled to the border between Zambia and the DRC. From there he called his brother in Lubumbashi and arranged to give him his passport so that he could apply for a South African visa for Mr Mpoyi. Mr Mpoyi's brother did so and procured a 'holiday' visa for the Republic of South Africa, valid until the 26th November 2017. That visa provides that Mr Mpoyi was entitled to visit South Africa for no longer than 30 days.
- (p) Mr Mpoyi alleges that he is unable to return to the DRC because his name and photograph appear on 'wanted' lists at the ports of entry into

the DRC. He fears that if he returns to the DRC he will be recognised and arrested. He is unable to seek asylum in any other country because his wife and children reside with him here in South Africa and depend on him for support.

- (q) Mr Mpoyi's wife, to whom he was married in 2008, possesses a Temporary Asylum Seekers Permit, and she earns a small income with which to support their family. Mr Mpoyi maintains that he is unable to work because he does not have a valid permit. Both his children were born in South Africa (the 13th May 2009 and the 1st February 2013). His son attends school in South Africa and he is in grade 3. His daughter will start grade R next year. Each of the children has a valid Asylum Seekers Temporary Permit.

[3] Mr Mpoyi further sets out in detail the background to his application for asylum. This starts with him being born in the DRC on the 21st May 1972, growing up there, becoming the first secretary for the UDPC in Lubumbashi and studying at university in the DRC. He was forced to leave the DRC in 2005. He alleges that he was arrested on a number of occasions by the National Intelligence Agency and detained in Kinshasa for short periods of time.

[4] In the Refugee Appeal Board hearing Mr Mpoyi alleged that he was imprisoned at the beginning of October 2003 in Kinshasa after demonstrating with 15 000 people at the United Nations office in Kinshasa, in order to hand over a memorandum. He was detained for eight months. After his release, Mr Mpoyi was again imprisoned during May, 2005. He was arrested together with approximately one hundred other students at the Université Pédagogique Nationale. This had not been recorded in the two interviews.

[5] In his founding Mr Mpoyi alleges he was tortured at the headquarters of the National Intelligence Agency. His right lower leg was badly injured during his torture, and due to media and political pressure he was taken to Kinshasa General Hospital where he stayed for one day to receive treatment. He received travel documents

and an air ticket from officials of his party, and travelled to Brazzaville in the Republic of Congo. From there he fled to Johannesburg.

[6] Mr Mpoyi then deals with the circumstances surrounding his application for condonation for the late filing of his review proceedings. He criticises the refugee centre for, as he puts it, dragging the matter out from 2005 until he obtained a decision from the Refugee Appeal Board in 2015. He criticises the decision of the Refugee Appeal Board as it took irrelevant considerations into account, it did not consider relevant considerations, it made its decision arbitrarily, capriciously and in bad faith and that the decision of the Refugee Appeal Board was not rationally connected to the information before it.

[7] The Refugee Appeal Board and the RSDO provided the record of the proceedings and their reasons for the decisions they made. Certain of the factual allegations of Mr Mpoyi are dealt with in the answering affidavits, but the Refugee Appeal Board and the RSDO abide the decision of this court.

[8] When the matter first came before me as an opposed motion, I raised with the parties' legal representatives that there appeared to be a manifest dispute of fact on the papers. This was because the respondents averred, inter alia, that there had been a case of identity fraud and that the present applicant, Mr Mpoyi, was not the person who appeared before them in 2005. The parties' legal representatives then considered their respective positions and Ms *Pudifin-Jones*, who appeared for the Minister of Home Affairs and the Director General: Home Affairs notified the court that she would not argue for the acceptance of allegations set out regarding the identity theft. She indicated, however, that she had no instructions to abandon those allegations. This was because she was unable to obtain instructions due to the fact that the file handler in the Office of the State Attorney was on leave. For various reasons it was then necessary to adjourn the application for four days. When they returned Ms *Pudifin-Jones* informed me that she had been given instructions to abandon reliance on any of the allegations regarding identity fraud. Mr *Suleman*, who appeared for Mr Mpoyi, then stated that he did not wish to pursue the matter of a referral to trial or for the hearing of oral evidence, but wanted to argue for final relief. I then heard argument on the matter.

[9] Mr *Suleman* then argued four issues:

- (a) The condonation application.
- (b) The circumstances surrounding the fact that Mr Mpoyi had allegedly re-availed himself of the protection of his country of origin.
- (c) The credibility of Mr Mpoyi.
- (d) The appropriate remedy.

[10] Mr *Suleman* referred me to the paragraphs in Mr Mpoyi's founding affidavit which set out the delay between the decision of the Refugee Appeal Board and this application. It is necessary for Mr Mpoyi to obtain the condonation of this court for the late filing of his application, which was made some 27 months after the decision of the Refugee Appeal Board.

[11] Section 7(1) of the Act provides that any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the applicant was informed of the decision sought to be reviewed. Section 9(1)(b) allows for condonation of the extension of the 180 day time period either by agreement between the parties, or by decision of a court on application by the applicant.

[12] As there is no consent between the parties for the condonation requested, it is necessary for me to decide that issue. Mr Mpoyi submits that his application for condonation should be granted because the interests of justice require that I do so (see s 9(2) of the Act). He submitted that the refugee centre dragged out the finalisation of this application for asylum from June 2005 until the appeal decision in 2015. He sets out in his founding affidavit the difficulties which he had in leaving South Africa without the necessary permission and having to return to the DRC to obtain a travel visa.

[13] Mr *Suleman* referred me to *City of Cape Town v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC). At para 46 of the judgment, the Constitutional Court records that the Constitution provides that 'all constitutional obligations must be performed diligently and without delay'. This is echoed in the Act which provides that proceedings for judicial review must be instituted 'without unreasonable delay'. The

court then quoted the SCA when dealing with the factors that needs to be considered when granting condonation:

'The relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of the delay; the importance of the issue to be raised; and the prospects of success.' (Footnotes omitted).

[14] Mr *Suleman*, correctly in my view, conceded that the applicant had not set out any detail explaining the 27 month delay. Mr *Suleman* submitted, however, that a lack of detail in explaining the delay should not trump the importance of the issue to be raised – the interests of justice. In this regard he referred to the extreme prejudice to which Mr Mpoyi would be subjected, were he to be compelled to return to the DRC.

[15] With regard to the suggestion that Mr Mpoyi re-availed himself of the protection of the DRC, he submitted that there were only two circumstances to consider:

- (a) His return to the DRC when he got married.
- (b) His return to the DRC in 2016 after the Refugee Appeal Board had dismissed his appeal.

[16] Mr *Suleman* submitted that the first occasion was disclosed to the Refugee Appeal Board and the circumstances of that hearing, as alleged by Mr Mpoyi are set out above. Mr *Suleman* submitted that after his appeal Mr Mpoyi faced two decisions: either reveal to the officials what he had done, or explore unofficial means of obtaining a passport. At that stage Mr Mpoyi reverted to what are euphemistically referred to as 'unofficial means' of travelling to the DRC and back and of obtaining a passport in that country together with a 'for holiday purposes' visa to visit South Africa for no more than 30 days. Mr *Suleman* submitted that cognisance should be taken of the fact that Mr Mpiyo had disclosed all this information in his affidavit.

[17] Mr *Suleman* handed me an extract from the *Handbook on Procedures and Criteria for Determining a Refugee's Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*. Mr *Suleman* submitted that, as set out in the Handbook, there were three requirements to establish whether an applicant had availed themselves of the protection of their country of origin:

- (a) voluntariness;
- (b) the intention to re-avail themselves of the protection of their country of origin; and
- (c) the re-availment itself.

These requirements had to be considered in dealing with the provisions of s 5 of the Refugees Act, which provides:

'5. Cessation of refugee status. – (1) A person ceases to qualify for refugee status for the purposes of this Act if –

- (a) he or she voluntarily reavails himself or herself of the protection of the country of his or her nationality; or
- (b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or
- (c) he or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or
- (d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or
- (e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.'

[18] Mr *Suleman* submitted that Mr Mpoyi voluntarily returned to the DRC on both occasions but did not intend to re-avail himself of the protection of the DRC. In addition, he was not afforded the protection of the DRC. When he returned to South Africa, the Refugee Appeal Board was clearly aware of the fact that his marriage

certificate originated in the DRC. The members of the Refugee Appeal Board made no enquiries in this regard. The fact that Mr Mpoyi got married in the DRC does not indicate that he invoked the protection of that country.

[19] With regard to the credibility of Mr Mpoyi, Mr *Suleman* submitted that the first interview was conducted without Mr Mpoyi being afforded the assistance of an interpreter, in circumstances where he was only competent to express himself in the French language. The contents of this interview were used in making the decision in the second interview. The decisions in both those interviews were then relied on by the Refugee Appeal Board. In those circumstances the unfairness in failing to provide Mr Mpoyi with an interpreter in the first interview, operated as a domino effect which ended up with the refusal to set aside the decision of the RSDO by the Refugee Appeal Board.

[20] Mr *Suleman* submitted that in terms of regulation 5 of the Refugee Regulations (Forms and Procedure), 2000 an interpreter is provided where practicable or necessary. If it is not practicable for the departmental officials to do so, the applicant is required to supply an interpreter which cannot be a representative or employee of the country in which the applicant fears persecution or harm.

[21] Mr *Suleman* questioned how there could be any reliance on allegedly different versions given by Mr Mpoyi, in circumstances where no proper interpreter was available. This submission was made whilst conceding that an interpreter had been available during the Refugee Appeal Board hearing. In this regard Mr Mpoyi alleges that the services of that interpreter were problematic.

[22] In dealing with the Refugee Appeal Board decision, Mr *Suleman* submitted:

- (a) In para 15 of its decision, the Refugee Appeal Board appears to have conceded that allowance had to be made for the language problems when Mr Mpoyi made his original applications. The last sentence of that paragraph reads:

‘However, due to lack proper English in wring the claims he will be government the benefit of the doubt (sic).’

Presumably the Refugee Appeal Board was suggesting that because of Mr Mpoyi's inability to express himself in writing in English, he would be given the benefit of any doubt.

- (b) In para 22, the Refugee Appeal Board appears to regard as implausible that the government of the DRC, having tortured Mr Mpoyi, sent him to hospital in circumstances where they wanted to kill him. Mr *Suleman* submitted that this takes no account of the allegations of media pressure made by Mr Mpoyi.
- (c) In para 36 of the Refugee Appeal Board decision they record that it is unlikely that Mr Mpoyi would face a reasonable possibility of being prosecuted if he returns to the DRC. Mr *Suleman* submitted that this was a *non sequitur* based on the information provided by Mr Mpoyi.

[23] Mr *Suleman* submitted that both the Refugee Appeal Board and the RSDO failed to apply their minds to the facts alleged by Mr Mpoyi, and that their decisions were not rationally connected to the facts presented to them.

[24] In the circumstances Mr *Suleman* seeks an order for condonation and the review of the Refugee Appeal Board decision. He submitted that I should consider substituting my own decision for that of the Refugee Appeal Board because there was obvious bias against Mr Mpoyi. In addition, the process has taken so long to be finalised that it would be unfair to Mr Mpoyi if I were to delay it any further by referring the matter back to the Refugee Appeal Board. If I were to hold in the alternative, that the decision of the Refugee Appeal Board be reconsidered afresh by it, I should introduce a time frame to ensure that the decision was made without undue delay.

[25] Mr *Pudifin-Jones* based her argument on three factors:

- (a) undue delay;
- (b) a lack of credibility on the part of Mr Mpoyi; and
- (c) the fact of Mr Mpoyi's re-availing of the protection of the DRC.

[26] Mr *Pudifin-Jones* referred me to the provisions of the Act, and in particular s 7(1) which provides that an application for judicial review must be instituted without unreasonable delay and not later than 180 days after notice of the decision. She emphasised the 27 month delay and recorded that the Constitutional Court has repeatedly emphasized the importance of the statutory time limits under the Act. In this regard she referred to *Buffalo City v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15 (16 April 2019).

[27] Ms *Pudifin-Jones* emphasised that the onus is on Mr Mpoyi to explain the entire period of the delay, which he had failed to do. The information contained in his founding affidavit dealing with condonation reflects very little of any moment. Ms *Pudifin-Jones* drew my attention to the fact Mr Mpoyi stated that towards the end of 2015, he had become increasingly worried about residing in South Africa illegally, and had returned to the DRC. (This must have been towards the end of 2016, as the visa is dated the 25th November 2016). He had thereafter returned on a holiday visa. It was only in reply that Mr Mpoyi raised the fact that he was not previously aware of the fact that free legal advice was available to him. This had only occurred in 2018 when the original application had been launched in 2017.

[28] Mr *Pudifin-Jones* also drew attention to the fact that the Mr Mpoyi had attended university and was clearly an educated person. In those circumstances the delay was unacceptable.

[29] With regard to the credibility of Mr Mpoyi, Mr *Pudifin-Jones* handed up a table which sets out the dates on which Mr Mpoyi had completed the first interview, the second interview with the RSDO and the Refugee Appeal Board hearing. She sets out on the chart the various differences which she maintains are contained in the versions given by him at each of these occasions. On this basis she submitted that Mr Mpoyi had put forward five substantially different versions as to his arrival in the Republic of South Africa. He also failed to set out how he had travelled from one country to the other, both in his journey to South Africa and his return to the DRC and back.

[30] With regard to re-avilment, Ms *Pudifin-Jones* submitted that if Mr Mpoyi re-availed himself of the protection of the DRC, he could not claim the status of a refugee. His marriage certificate was issued on the 22nd February 2016, and clearly indicates that Mr Mpoyi had, during 2008, invoked the protection of the DRC by electing to be married in that country. She also criticises the fact that Mr Mpoyi had relied upon a South African holiday visa in order to re-enter South Africa. She submits that he must have known in those circumstances that he was not entitled to do so.

[31] Ms *Pudifin-Jones* drew my attention to para 121 of the Handbook where it states that if a refugee applies for, and obtains a national passport or its renewal, they will, in the absence of proof to the contrary, be presumed to have intended to avail themselves of the protection of the country of their nationality. (I note that para 121 goes on to state that the acquisition of a document such as a marriage certificate or similar service cannot be regarded as a re-avilment of protection).

[32] Mr *Pudifin-Jones* submitted that in the circumstances the application falls to be dismissed. She submitted that the decision of the Refugee Appeal Board, whilst not perfect, is sufficient and none of the factors set out in s 6(2) of the Act are present to an extent which will justify the review and setting aside of the Refugee Appeal Board's decision.

[33] In reply Mr *Suleman* drew my attention to the fact that the Minister of Home Affairs and the Director General: Home Affairs had not dealt with the interpreter problem in their affidavits. He submitted that even if Mr Mpoyi had used unofficial means to return to the DRC, his intention was never to seek the protection of that country, and he cannot be said to have availed himself of its protection in the circumstances.

[34] The first issue I must consider is that of condonation. As s 7(1) of the Act refers to the fact that proceedings for judicial review 'must be instituted without unreasonable delay and not later than 180 days after the date....' it is reasonable to assume that the legislature regarded any period after the 180 days to be an unreasonable delay. In the present circumstances Mr Mpoyi waited some two years and three months before bringing the application for review. He was thus over four times outside the limit of reasonableness as it may be viewed in the Act.

[35] In my view Mr Mpoyi has given no reasonable explanation for the unwarranted delay in bringing the review application. He was clearly aware of the Refugee Appeal Board's decision, and he was aware that he was then required to leave the Republic of South Africa. It was his concern for this fact that prompted him to obtain a holiday visa to return to South Africa during November 2016. Prior to that Mr Mpoyi had appeared before an official at the refugee centre in Durban on the 25th June 2005, had appeared before the RSDO on the 30th November 2009 and on the 10th December 2009, and had appeared before the Refugee Appeal Board on the 20th April 2015. In the circumstances he must have been acutely aware of the fact that time periods operated with regard to the taking of decisions and further steps in the process of obtaining the status of a refugee.

[36] I am acutely aware of the effect which the relief sought by Mr Mpoyi will have upon his life and that of his family. If the application for condonation or the application on the merits is refused, he will have to return to the DRC. His family will then be faced with the unenviable choice of following him there or remaining here and living apart from him. The delay, however, seems inexcusable, particularly for a person who has been educated to a tertiary level. To condone the late bringing of his application will no doubt affect the administration of justice and the approach of other litigants to compliance with the provisions of the Act. Simply to ignore the two years and three months delay because of sympathy with the plight of Mr Mpoyi and his family, does not assist the proper administration of justice. Were the inordinate delay to be condoned in circumstances where it should not be, other litigants will consider themselves hard done by if they are not afforded the same relief. The explanation for the delay is almost non-existent and it does not cover the period of delay. The review application should have been instituted by the 6th January 2016, but was only instituted on the 2nd June 2017 – overdue by some 17 months. Mr Mpoyi does not disclose whether he ever discussed the decision of the Refugee Appeal Board with his erstwhile attorneys. It seems more than probable that he would have done so, and been given advice about a possible review.

[37] There are manifest disputes of fact between the versions of Mr Mpoyi and the respondents. On the different versions of Mr Mpoyi alone there are improbabilities and contradictions.

[38] I refer to the approach of our courts to delay as set out in *Cape Town City v South African National Roads Agency Ltd & others* 2015 (6) SA 535 (WCC) para 21 to 33; *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 69 and what has been stated by Professor Cora Hoexter in *Administrative Law in South Africa* 2 ed, (2011) at 534 – 538.

[39] Insofar as the merits of Mr Mpoyi's matter have influenced my approach to delay I do not consider the reasoning of the Refugee Appeal Board to be reviewable. In addition, the interests of justice would not be served by allowing condonation of such an inordinate delay which Mr Mpoyi has not seen fit to deal with in any detail.

[40] I record that the fact that the political party headed by Joseph Kabila no longer rules in the DRC played no part in my considerations. I have reached my decision based solely on the information available to the Refugee Appeal Board and the explanation given for the delay by Mr Mpoyi. That explanation is clearly inadequate.

[41] In all the circumstances I make the following order:

‘The application for condonation is refused and consequently the entire application is dismissed.

Lopes J

Date of hearing: 21st June 2019

Date of judgment: 3rd July 2019

For the applicant: Mr M Z F Suleman (instructed by Norton Rose Fulbright South Africa Inc)

For the third and fourth

respondents: Ms S F Pudifin-Jones (instructed by the State Attorneys)